IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 435 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PREMBHAI G DHODIA

Versus

BHANABHAI GANDABHAI DHODIA THRO' HIS HEIRS

Appearance:

MR SC SHAH for MR SN SHELAT for Petitioner

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 13/01/97

ORAL JUDGEMENT

1. This is a Second Appeal under section 100 of CPC, wherein the appellant is the original defendant and the respondents are heirs of the original plaintiff.

2. The plaintiff had filed Regular Civil Suit No.92/73 for partition by metes and bounds, in respect of the suit property, and for possession of the properties coming to his share together with accounts for mense

profits etc.

3. The suit property consists of Survey No.466 consisting of land plus a house thereon (referred to in para 3(B) of the plaint), as also Survey No. 494 consisting of only open land (referred to in para 3(A) of the plaint).

4. On the basis of the pleadings of the parties, and on appreciation of the evidence led by the parties on the relevant issues, the trial court decreed the plaintiff's suit, and declared the plaintiff to be a half sharer in respect of both the properties which were the subject matter of the suit.

5. The defendant being aggrieved by the said judgment and decree, preferred a Regular Civil Appeal before the lower appellate court under section 96 of CPC. On the reappreciation of the evidence of record, the lower appellate court partly allowed the appeal of the defendant, and dismissed the plaintiff's suit as against the property referred to in para 3(B) of the plaint i.e. in respect of the land and the house thereon of Survey No. 466. However, the lower appellate court confirmed the trial court decree in respect of the property at para 3(A) of the plaint i.e. Survey No.494.

6. The original defendant has therefore, preferred the present Second Appeal, under section 100 of CPC, challenging the concurrent decree passed by both the courts below in respect of Survey No.494.

7. It may be mentioned here that the claim of the plaintiff so far as the partition of moveable properties is concerned, has been negatived both by the trial court as also by the appellate court, and that for this reason, the same does not require any discussion here. No cross-objections are filed in the present appeal.

8. Before dealing with the present appeal on merits, it is necessary to examine the scope and ambit of the present appeal under section 100 CPC.

9. The scope of section 100 CPC, and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well defined and require no detailed discussion. The Supreme Court has, in the case of Ramaswamy Kalingaryar Vs. Mathayan Padayachi (AIR 1992 Supp (1) SCC page 712), and in the case of Parsini (dead) through Legal Representatives Vs. Atma Ram (AIR 1996 SC 1558), clearly reiterated the principle that the

High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of "sufficiency of proof ".

10. Learned counsel for the appellant has, in his earnest efforts to upset the decree passed by the lower appellate court, taken me through the relevant evidence on record. He has also referred to written statement at ex.17, and in particular to the oral evidence of the defendant at ex.47, the mortgage document at ex.48 and the redemption receipt at ex.49.

11. One of the main reasons on the part of the lower appellate court for holding against the appellant-defendant is a finding of fact arrived at by it to the effect that although it was the defendant who had cultivated the land since about 20 years prior to the suit, so far as the possession thereof is concerned, it was a joint possession as between the plaintiff and the defendant. While recording this factual finding, the lower appellate court has approved of the appreciation of the evidence on this aspect by the trial court as well. Thus, this is a concurrent finding of fact, which would be extremely difficult to upset by the present appellant unless it can be shown that such appreciation is a perversity in law, or that such finding is based on " no evidence". However, on an independent appreciation of the evidence, I find that this is not the case.

12. The case as pleaded by the defendant in his written statement ex.17, and as attempted to be made out by the oral and documentary evidence on record, is to the effect that by an oral agreement, styled as a family arrangement, the defendant had redeemed Survey No. 494 from the mortgage, and had also undertaken the maintenance of the mother, and it was for that reason why the said land was treated by all family members as having been allotted to him. In other words, it was sought to be pleaded that this family arrangement amounted to a partition in respect of Survey No.494.

13. First of all, this plea is based on an oral understanding or at best a family arrangement based on an oral understanding between the mother, the plaintiff and the defendant. Admittedly, there is no writing as regards

such an understanding.

14. What must be noted in this context is, that before any family arrangement can in law be deemed to be a partition, or can be deemed to amount to a partition, it must be an arrangement amongst all the coparceners. Even if an oral understanding is established by proper and credible evidence on record, the said would not in law, amount to a partition amongst coparceners of HUF property unless all the coparceners were a party to such an understanding. It is here as a first step, where the defendant's plea falls short of the legal requirement. Even if the so-called oral understanding can be presumed from the conduct of parties without any supporting or corroborative evidence whatsoever, it is neither alleged, pleaded, averred nor shown that two other brothers who were also coparceners were party to such oral understanding. The other two brothers are not parties to the suit.

15. A further hurdle in the way of the appellant is that even if it be assumed for the sake of argument, that the defendant had undertaken to redeem the mortgage, and to maintain his mother for and on behalf of other coparceners, the same would not necessarily amount to transfer of title in his favour in respect of the suit property, as if the undertaking of such an obligation on his part amounted to a partition in law. There cannot be any controversy that as and when there is a partition, and the consequential allotment of a specific share to a specific coparcener, that would amount to a transfer of title in favour of such coparcener. However, a mere undertaking to maintain the mother and/or to redeem an ancestral property from a mortgage, ipso facto does not amount to a partition and cannot transfer legal title of such property in favour of the concerned coparcener.

16. There is yet another hurdle in the way of the defendant. The oral evidence clearly indicates that on the death of the parties' father or within about two months thereafter, the mother had summoned her sons including the plaintiff and the defendant, and had inquired of them as to who would be willing to maintain her. It is an admitted fact that upto this point of time, the defendant could not and did not claim exclusive title to Survey No.494 on account of a deemed partition. Moreover, further reference to the oral deposition of the defendant (ex.47) further indicates an admission on his part (at different places in his cross-examination), that for about two years after the death of his father i.e. for a substantially long period, after the aforesaid

query was put to her sons by the mother of the parties, the plaintiff and the defendant were in joint possession of Survey No.494. This admission on the part of the defendant clearly militates against the so-called oral family arrangement.

17. Another hurdle in the way of the defendant is that the redemption receipt in respect of the mortgage in question (the receipt being at ex.49) indicates that the redemption was in favour of the mother of the parties, and not in favour of the defendant as claimed by him. Although the defendant claimed and asserted that the funds for the redemption had been provided by him out of his own sources, this is nothing but an oral assertion on his part without any any corroborative evidence. Another deficiency, which becomes apparent on examining the oral evidence of the defendant(ex.47) is the assertion made by him, and the contradictions in this regard, as regards the execution of the redemption receipt at ex.49 itself. At one place the defendant stated that the receipt was prepared and signed by the mortgagee Jaichand. On the other hand, he also asserted that the body of the receipt was prepared by a scribe (who is now dead), but was signed by the mortgagee Jaichand in presence of the defendant. However, even a casual perusal of the receipt at ex.49 clearly indicates, without any doubt and or scope for controversy, that the body of the receipt as well as the signature of the mortgagee thereunder are both written by the same person, i.e. in the same hand. Thus, the defendant's oral assertion in this context, is also not sustainable.

18. From the impugned judgment of the lower appellate court it appears that the said court has taken a somewhat charitable view while appreciating the total evidence on record. In this context, the lower appellate court has observed that it may be that since the defendant had undertaken the obligation to maintain his mother, he was permitted by the plaintiff to cultivate the field, and to apply the income from its produce to such maintenance. This conclusion, as observed hereinabove, is at best a presumptive conclusion, and not the conclusion based on the evidence on record. Thus, even assuming for the sake of argument that this finding of the lower appellate court is somewhat sustainable, it nevertheless follows (as observed by the lower appellate court itself) that this would not deprive the plaintiff of his rightful share in the disputed field, since no earlier partition or a family arrangement in the nature of a partition, has been proved by the defendant.

19. Thus, even on a total reappreciation of the evidence on record, which exercise I have carried out only for the satisfaction of the learned counsel for the appellant, (although not justified in a Second Appeal,) I find that there is no reason, let alone sufficient reason to interfere with the findings of fact recorded by the two courts below.

20. In the result, no substantial question of law arises in the present appeal, which would require a discussion herein.This appeal is therefore, dismissed with no order as to costs.

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